No. 46251-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re PATRICIA L. FORSBERG SPOUSAL TRUST u/w of WALTER A. FORSBERG, Deceased.

PAULINE FORSBERG and LESLIE FORSBERG,

Appellants,

v.

PATRICIA L. FORSBERG, in her representative capacity as Trustee of the Patricia L. Forsberg Spousal Trust and in her individual capacity; REBECCA and JAMES HINKEN, and their marital community; PARIS and FRED LUJAN, and their marital community; DEBORAH and MICHAEL SOMERS, and their marital community; and all persons or parties unknown claiming any right, title, estate, lien, or interest in the real estate described in the complaint herein,

Respondents.

APPEAL FROM THE SUPERIOR COURT
FOR CLALLAM COUNTY

REPLY BRIEF OF APPELLANTS

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I. INTRODUCTION

"It is axiomatic that a party may not accomplish by indirection that which he is specifically forbidden to do directly." *Vedder v. Spellman*, 78 Wn.2d 834, 836, 480 P.2d 207 (1971). Thus, a party to a mutual will cannot avoid the effect of the testamentary instrument by disposing of her property before death. *Newell v. Ayers,* 23 Wn. App. 767, 770, 598 P.2d 3, *rev. denied* 92 Wn.2d 1036 (1979).

Patricia and Walter Forsberg agreed their separate property holdings would become community property after the death of the first spouse to die, the property of the first spouse to die would be available for the "health, support and maintenance" of the surviving spouse, and at the death of the second spouse to die, the combined property would be inherited by their respective heirs "in proportion to their relative ownership of property prior to its becoming community property." CP 280-281. There is no dispute that Walter owned 73.5% of the total property and Patricia owned 26.5% of the total property when Walter died. CP 300. Dissatisfied with the 26.5% her heirs could inherit under the irrevocable contracts, CP 318-9, Patricia gave them over $1.2 million in land that had been Walter's separate property plus more than $200,000 after probating and accepting the benefits of Walter's Will. CP 86-88, 342-346. She admits Walter's daughters will inherit less than his

proportionate share of the combined property because of her gifts. CP 77.

Patricia's defense is that by recharacterizing their combined property as community property when Walter died, the FPA and mutual wills authorized her to do anything she wanted with one half, including give it away. Patricia argues that since the distribution plan that became irrevocable under the FPA and mutual wills when Walter died applies only to property "remaining" at her death, she is free to reduce the remainder by gifts during her lifetime. However, this would give Patricia all the benefits of the FPA and mutual wills while evading her end of the bargain. When Patricia dies, the contracts require that her children shall receive her proportionate share of the combined property (26.5%) of both her estate and Walter's estate. CP 280-282, 307-308. Likewise, Walter's children shall receive his proportionate share (73.5%) of both estates. *Id.* If Patricia could give away her half of the newly created community property and thereby dissipate her estate before she dies, the consideration for Walter's gift of 26.5% of his estate to Patricia's children would fail.

Patricia has accepted the benefits of the FPA and the mutual wills and cannot evade their reach by dissipating her assets before she dies. What makes the facts of this case particularly compelling and stronger than *Newell,* 23 Wn. App 767, is the fact that the community property

Patricia asserts the right to give away did not even belong to her before Walter died. The half-interest in the total combined property was a creation and benefit of the FPA and the mutual wills; otherwise, Patricia would have had only 26.5% of the total combined property to support herself after Walter died. The consideration for making 50% available to support Patricia was Patricia's promise to distribute the remainder not needed for her support to their heirs in the same ratio they owned the property before it was converted to community property at Walter's death – 26.5% to Patricia's heirs and 73.5% to Walter's heirs. Patricia's argument that this distribution ratio only applies to the "remainder" begs the central question of this case, which is whether she can reduce the remainder available for distribution when she dies by giving it away now. The answer under settled law is no.

In addition to violating the jurisprudence on mutual wills, the contractual duty of good faith, and Walter's clear intent, Patricia's position would yield an absurd result: solely because Walter died first, Patricia's children will receive 63.25% of the combined property Walter and Patricia owned at the time of Walter's death, which exceeds Patricia's percentage of relative ownership by 36.75%, and which is 50% more than they would have received if Patricia had died first. Patricia never addresses this point.

II. REPLY STANDARD OF REVIEW

When reviewing a summary judgment, the appellate court engages in *de novo* review and considers all facts and reasonable inferences from them in the light most favorable to the nonmoving party. *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593, 600, 260 P.3d 857 (2011). Although Patricia does not disagree with the standard of review, she urges this Court to make unreasonable inferences that conflict with the plain meaning of the FPA and mutual wills.

III. REPLY STATEMENT OF FACTS

A. Patricia's Community Property Interest Was Created By The FPA And Mutual Wills.

Patricia emphasizes that the property she gave away was her share of community property that passed to her by operation of law when Walter died. This fact is only partially true, however, and is taken out of the context of the joint estate plan. Patricia ignores the fact that the community property interest created at Walter's death was one of the benefits she received under the mutual estate plan, not a property interest she owned independent of the FPA and mutual wills. Before Walter died, Patricia owned just 26.5% of the total property. Only because of the joint estate plan, she received 50% of the property to use for her care and support after Walter died, plus the income generated from the half placed in the spousal trust, CP 280-1, 306, plus use of the trust assets if the newly

created community share was insufficient to meet her needs. CP 307. The consideration for the benefits Patricia accepted was her promise that when she died her estate along with Walter's would go "to their respective children or issue in proportion to their relative ownership of property prior to its becoming community property"; i.e., 26.5% to her children and 73.5% to Walter's children. CP 280.

B. Walter's Intent Was To Divide His Property Under The 26.5%-73.5% Ratio After Providing For Patricia's Needs.

Patricia correctly asserts that the primary duty of this Court is to "give effect to the testator's intent," Resp. Brf. at 28, yet she avoids the express language of the FPA, which states:

> Husband's and Wife's intent, as set forth in each of their wills, is to provide for each other's health, support and maintenance in their accustomed manner of living and, after both of their deaths, to dispose of their combined estates, to their respective children or issue in proportion to their relative ownership of property prior to its becoming community property. CP 280-281 (emphasis added).

Disregarding this plain statement, Patricia extrapolates that Walter intended she could give away half their combined property based on the operation of a statute that is not mentioned in the FPA or the mutual wills, RCW 11.02.070. Resp. Brf. at 30-31. This Court should not substitute Patricia's strained inference for the actual intent of the testator as stated in the contracts. "[I]ntent should, if possible, be garnered from the language of the will itself." *Stranberg v. Lasz,* 115 Wn. App. 396, 404-405, 63 P.3d

809 (2003); *Estate of Wright*, 147 Wn. App. 674, 681, 196 P.3d 1075 (2008), *rev. denied*, 166 Wn.2d 1005, 208 P.3d 1124 (2009).

C. The Creation Of Community Property Was Not The Goal Of The Estate Plan, But Merely A Way To Reduce Taxes.

Contrary to Patricia's current position and the correspondence she emphasizes in her brief, the following passage from her lawyers' 2010 letter clearly acknowledged that the purpose behind the community property recharacterization was merely to limit estate taxes, not change the spouses' respective ownership interests:

> This recharacterization of all of the estate property as community property was done primarily to minimize or avoid an estate tax on your father's [Walter's] portion of the estate assets. Though the Inventory characterizes all of the estate assets as community property, the Property Agreement preserves each spouse's percentage of relative ownership in the estate assets by requiring that the assets shall be put into a trust for the benefit of the surviving spouse, and that, upon the death of the surviving spouse, the total remaining estate shall be distributed among both spouses' children according to each spouse's percentage of relative ownership. CP 317 (emphasis supplied).

The current importance Patricia places on the community property characterization conflicts with her prior analysis, which explained it as a means for reducing taxes, not intended to affect the ultimate distribution of the combined property when she dies.

D. Patricia Made Gifts To Evade The Joint Estate Plan.

When Patricia calculated the respective ownership percentages

after Walter died, she claimed to be "shocked" and "disappointed" that her share was only 26.5%, because she had wanted her heirs to receive more. CP 318-19. Patricia nevertheless admitted in 2010 correspondence that all the assets would be held in trust and distributed pursuant to the relative ownership percentages at her death:

> In this case, as the surviving spouse, Patti will be the beneficiary of a trust that contains all of your father's *and her* assets. During Patti's lifetime, she is entitled to receive all of the income of the trust estate assets, and she may sell any of the assets, except the Forsberg Farm property, if the income of the trust estate is not sufficient to support her. On her death, the remaining assets shall be distributed in accordance with the percentage of relative ownership I explained above. CP 317-318 (emphasis supplied).

In the same 2010 letter, Patricia asked Walter's daughters to agree to a different distribution, where they would receive 50% of the total property instead of 73.5%. *Id.* When Walter's daughters did not agree, Patricia accepted the benefits of the FPA and Walter's Will, and then made gifts totaling more than $1.4 million to remove the gifted property from the distribution plan mandated by the FPA and the mutual wills. Patricia's arguments conflict with her prior admissions as to the operative effect of the joint estate plan.

E. Patricia's Gifts Will Cause Her Children To Receive A Disproportionate Windfall.

Patricia's gifts will cause the ultimate distribution of the combined property to vary substantially from the ownership ratio at the time of

Walter's death and the distribution that would occur under her reasoning if she had died first. This remarkable variance, which Patricia does not address in her briefing, is illustrated below:

	% To Walter's Heirs	% To Patricia's Heirs
Ownership Ratio When Walter Died (CP 300)	73.50%	26.50%
First To Die Walter Assuming Survivor Has The Right To Give Away Half Of The Combined Property	73.5% of 50% = 36.75%	50% + 26.5% of 50% = 63.25%
First To Die Patricia Assuming Survivor Has The Right To Give Away Half Of The Combined Property	50% + 73.5% of 50% = 86.75%	26.5% of 50% = 13.25%

An undisputed fact never explained by Patricia is how the testators could rationally have intended an estate plan that would result in a 50% distribution variance based solely on the sequence of the testators' deaths.

F. Patricia's Interpretation Creates An Implied Gift To Her Heirs Of Almost 32% Of Walter's Property.

Patricia's actual share of the total property was 26.5% when Walter died, but she is claiming the right to give away 50%. The difference -- 23.5% of the total property -- equals 31.97% of Walter's 73.5% share of the total, or $1,591,158.21 using date of death values. CP 300. If Patricia's interpretation prevails, her children will receive this share instead of Walter's daughters, thus resulting in an implied gift of

almost one-third of Walter's property to Patricia's children, in addition to the 26.5% of Walter's estate that Patricia's children are to receive under his Will. CP 307-8.

IV. REPLY ARGUMENT

A. The Action Is Not Time-Barred.

Relying on RCW 11.68.110 and RCW 11.96A.070(2), Patricia argues the only avenue for challenging the gifts she made in 2012 was to object to her Declaration of Completion issued the year before. This argument fails for two reasons. First, Patricia could not curtail the third party beneficiaries' enforcement rights by substituting the 30-day statute of limitations under RCW 11.68.110 for the six-year statute of limitations that applies to written contracts. Second, the time-bar that would apply to claims against Patricia as personal representative does not apply to claims that she violated the Forsberg Property Agreement in her individual capacity after she was discharged as personal representative.

1. The contractual rights of Walter's daughters could not be modified after Walter died.

This action is to enforce a written contract – the FPA and the mutual wills. RCW 4.16.040(1) applies a six-year limitations period to "[a]n action upon a contract in writing, or liability express or implied arising out of a written agreement." "This language is very broad in its

scope[,]" and applies to "implied liability arising out of a written instrument" in addition to "express liability arising out of a written contract." *Kloss v. Honeywell, Inc.*, 77 Wn. App. 294, 299, 890 P.2d 480 (1995). A cause of action accrues when a party has a right to seek relief in the courts. *Colwell v. Eising*, 118 Wn.2d 861, 868, 667 P.2d 1124 (1992); RCW 4.16.005. Here, Walter's daughters filed suit well within six years, even if they could be charged with knowledge of the breach dating back to the Declaration of Completion and Allocation Agreement. They received these documents in June 2011, discovered the gifts in June 2013, and filed suit in September 2013. CP 97, 322, 349.

Patricia could not truncate the statute of limitations on the appellants' contract claims from six years to 30 days by issuing the Declaration of Completion. As third party beneficiaries with the right to "specifically enforce" the contracts, CP 282, 302, Walter's daughters had six years to file their breach of contract claims. "When a third-party beneficiary has a right to sue on a written contract made for his benefit, the 6-year statute of limitations applies." *Indus. Coatings Co. v. Fid. & Deposit Co.*, 117 Wn.2d 511, 518, 817 P.2d 393 (1991) (reversing summary judgment dismissal of claims). Any modification of the appellants' contractual rights after Walter's death was expressly forbidden by the FPA and mutual wills. CP 282, 302. Thus, any attempt by Patricia

to apply the 30-day window to the third party beneficiaries' contract claims is itself an actionable breach of the FPA and mutual wills, subject to the six-year statute of limitations for written contracts.

2. Patricia could not immunize herself from personal liability by filing the Declaration of Completion.

An action brought by a third party beneficiary to remedy and enjoin breaches of a mutual will by the second testator to die is not time barred by RCW 11.68.110 or RCW 11.96A.070(2), which discharge personal representatives from liability in their representative capacity for conduct occurring prior to discharge. Washington courts have long recognized the distinction between individual and representative capacity. *See, e.g., Rennie v. Wash. Trust Co.*, 140 Wash. 472, 249 P. 992 (1926).[1] Here, Patricia signed the FPA in her individual capacity, she signed the gift deeds in her individual capacity, and she was sued in her individual capacity. CP 256, 283, 342, 344, 346. RCW 11.68.110 and RCW 11.96A.070(2) do not apply to claims that Patricia violated the FPA and the mutual wills in her individual capacity by giving away property.

The probate of Walter's estate could not discharge Patricia from

[1] In *Rennie*, 140 Wash. 472, Plaintiff claimed property that Defendant as personal representative had taken for himself. Plaintiff sued Defendant in his individual capacity only, not as personal representative of the estate. The trial court dismissed holding Plaintiff was required to sue Defendant as personal representative. The Supreme Court reversed, holding the action could be brought against the defendant either in his individual or his representative capacity.

contractual duties she undertook in her individual capacity when she signed the FPA and mutual wills. Patricia's contractual duties survived Walter's death and are binding on Patricia, her heirs, and her estate. CP 282. Patricia could not alter her contractual duties by filing the Declaration of Completion or signing the Allocation Agreement because modification was expressly prohibited after the death of the first spouse to die. *Id.* Such modification would be an actionable breach of the contracts subject to the 6-year statute of limitations.

The mutual will cases preclude Patricia's time-bar defense. Mutual wills create "fixed obligations which will be specifically enforced." *Estate of Richardson*, 11 Wn. App. 758, 761, 525 P.2d 816, *rev. denied*, 84 Wn.2d 1013 (1974). The purpose of mutual wills is to determine the distribution plan that will determine the "ultimate disposition" of the testators' property "after ***both*** are deceased." *Newell v. Ayers*, 23 Wn. App. at 769 (emphasis in original). Thus, almost by definition mutual wills remain in effect and can be enforced after the predeceasing testator's property has been distributed and their probate finalized and closed. For example, in *Newell,* 23 Wn. App. 767, the action was filed and the mutual will was enforced 23 years after the first testator's death. It would nullify the purpose of mutual wills to hold that closing the probate of the predeceasing testator's estate foreclosed later enforcement action for

breach of the mutual wills.

B. Patricia Breached The FPA And Mutual Wills By Making Gifts To Her Children.

Patricia's arguments would reverse the jurisprudence on mutual wills, obliterate the contractual duty of good faith, make a mockery of Walter's intent, and yield absurd results.

1. Patricia's emphasis on community property law does not distinguish controlling precedent on mutual wills.

"Once the survivor elects to take under the provisions of ... a [mutual] will, he is not free to avoid the obligation to dispose of his property as previously agreed." *Newell v. Ayers*, 23 Wn. App. at 769. Patricia attempts to distinguish *Newell* by arguing the property she gave away was community property, over which she had complete dominion and control by operation of RCW 11.02.070, as opposed to property she inherited under Walter's will. This is disingenuous at best. *Newell* and the rationale behind its holding are not limited to situations where the second-to-die testator's property derived from the mutual will. Moreover, the property in *Newell* "was presumptively community[.]" *Id.* at 770. Nevertheless, the *Newell* Court ruled that all the property of the surviving testator was subject to the distribution plan agreed to under the mutual wills. *Id. Newell* cannot be distinguished from the facts of this case.

In fact, the argument for invalidating Patricia's gifting is stronger

than in *Newell,* because the property Patricia gave away had been Walter's separate property. Unlike *Newell,* where the surviving spouse gave away property that was "presumptively community" prior to the mutual wills, Patricia's community property interest was *created by* the FPA and the mutual wills. It is a direct benefit created and conferred by the joint estate plan. Without the FPA and mutual wills, Patricia would have received just 26.5% when Walter died. The benefit of the bargain Patricia received is contingent on her compliance with the focal term of the contracts – when the second spouse dies, the combined estates shall be divided pursuant to the agreed upon 73.5% -- 26.5% ratio. Under *Newell*, Patricia cannot avoid this distribution ratio by giving the property away before she dies.

When Walter died, he had the right to expect that the ultimate distribution of both estates would follow the date-of-death ownership percentages. In reliance on Patricia's mutual promises, Walter kept in place an estate plan whereby a portion of his estate (26.5%) will go to Patricia's heirs when she dies. CP 307-8. Once Walter died, Patricia could not change the joint estate plan:

> When a husband and wife make an agreement as to the manner of the disposition of their property after both are deceased and to make mutual wills to carry such agreement into effect, and thereafter make such wills, if the surviving spouse causes the will of the decedent to be admitted to probate, the estate administered upon, and accepts the benefits conferred upon him by such will, he is deemed to have elected to take under the agreement and will and

cannot thereafter free himself from the obligations created thereby. *Auger v. Shideler*, 23 Wn.2d 505, 513, 161 P.2d 200 (1945).

Patricia attempts to evade the clear holding of the mutual will cases and the contracts she signed by inferring that the contracts were intended to allow *inter vivos* gifting because they only distribute the "remaining" assets at the death of the second spouse to die. The fact that property previously given away is no longer subject to the 26.5%-73.5% estate distribution plan is self-evident. This truism, however, begs the central question of this case, which is whether Patricia can reduce what remains at death by gift. The answer to this question under settled and binding case law is no.

2. Patricia's arguments distort Walter's clear intent.

The parties agree "the paramount duty of a court in construing and interpreting the language of a will is to determine and implement the intent of the testator or testatrix"[2] and that "intent should, if possible, be garnered from the language of the will itself."[3] However, Patricia infers from the words "community property" and RCW 11.02.070 the strained conclusion that Walter wanted her children to receive more of his property than his own. Resp. Brf. at 30-31. This conclusion violates the express statement

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[2] *Estate of Wright*, 147 Wn. App. at 681 (2008); RCW 11.12.230.

[3] *Stranberg v. Lasz,* 115 Wn. App. 396, 404-405, 63 P.3d 809 (2003) (citations omitted); *Wright*, 147 Wn. App. at 681.

of intent found in the FPA: After providing for the "health, support and maintenance" of the surviving spouse, the testators intended to "dispose of their combined estates, to their respective children or issue in proportion to their relative ownership of property prior to its becoming community property." CP 280-1.

The contract language does not remotely imply that Walter intended Patricia to be able to give away half the combined property. The provisions that create community property state:

> Husband and Wife wish to establish that all property listed in Exhibits A, B and C together with all earnings, reinvestments and replacement property thereof is held by Husband and Wife as community property under the laws of the state of Washington as of the date of the death of the first spouse to die. CP 280.
>
> The terms of the Agreement provide that all property owned by me and my spouse shall be community property upon the death of the first one of us to die. We have also agreed to execute mutual wills which include a specific plan for ultimate distribution of all of our combined property as set forth in our wills. CP 302.

These provisions do not state that the survivor has dominion and control or any individualized property rights; nor do they refer to the statute (RCW 11.02.070) Patricia now asserts must have informed Walter's intent.

Inferring that Walter intended Patricia to be able to give away half of their combined property reads the words "community property" in isolation from other words in the same paragraph and other parts of the agreement. A single word in a contract or statute should not be read in

isolation. *State v. K.L.B.*, 180 Wn.2d 735, 742, 328 P.3d 886 (2014) (citing the rule *noscitur a sociis*); *Ball v. Stokely Foods*, 37 Wn.2d 79, 87-88, 221 P.2d 832 (1950) (applying *noscitur a sociis* to interpret a contract); *Allstate Ins. Co. v. Peasley*, 131 Wn.2d 420, 424, 932 P.2d 1244 (1997) (contract phrases cannot be interpreted in isolation). Immediately following "all property...shall be community property upon the death of the first one of us to die" is the statement that the "ultimate distribution of all of our combined property" will be "as set forth in our wills." CP 302. With the express intent of the testator being to "dispose of their combined estates, to their respective children or issue in proportion to their relative ownership of property prior to its becoming community property," CP 280-281, the inference that "community property" connotes the right to give away property to avoid testamentary distribution is patently unreasonable.

An inferred right to give away half the property also conflicts with the provisions of the FPA that limit the survivor's right to dispose of property beyond his or her relative share of ownership:

> Husband and Wife shall not modify or revoke the terms of this Agreement or their last Will and Testament after the death of the other; provided, however, the surviving spouse may dispose of his or her percentage of relative ownership as he or she chooses, so long as the Forsberg Farm is distributed to Walter A. Forsberg's children or issue and the Teepee property is distributed to Patricia L. Forsberg's children [or] issue. CP 282.

The undeniable fact is that Patricia did not receive complete dominion and control over half the combined property when Walter died, as she contends, because her right to dispose of the property by will or nonprobate transfers was limited to her 26.5% relative percentage share. CP 282, 308.

Even read in isolation, the ordinary meaning of community property does not support the inference Patricia urges. Words in a contract are given their usual and ordinary meaning. *Patterson v. Bixby,* 58 Wn.2d 454, 458, 364 P.2d 10 (1961). Common usage is more meaningful than legal definitions in interpreting wills and contracts, because the Court is concerned with the testator's intent, not that of the legislature. *Estate of Wright*, 147 Wn. App. at 684. *See also Allstate Ins. Co. v. Peasley*, 131 Wn.2d at 424 (undefined terms should be given their ordinary and common meaning, not their technical, legal meaning). Language in a contract susceptible to more than one meaning "will be given the meaning which best gives effect to the intention of the parties." *Patterson v. Bixby*, 58 Wn.2d at 458. The dictionary meaning of community property is simply "Property held jointly by a husband and wife."[4]

The attenuated inferences Patricia makes based on the phrase community property are not reasonable. From this phrase read in isolation

[4] *See* www.merriam-webster.com/dictionary/communityproperty.

Patricia argues that Walter had in mind, not only the technical legal meaning of community property, but moreover that he intended certain *legal consequences* based on these words. The right to give away half the community property is not stated in the FPA or the mutual wills, or even in the statute that Patricia argues informed Walter's intent. *See* RCW 11.02.070. Interpreting "community property" to mean that Walter intended to allow Patricia to give away half their combined property so that it would not be distributed under the mutual wills is not a construction that gives effect to the express intent of the testators, which was to create an estate distribution plan for the "ultimate distribution of all of our [their] combined property[.]" CP 302.

Patricia's reliance on *Cornish Coll. of the Arts v. 1000 Va. Ltd. P'ship*, 158 Wn. App. 203, 242 P.3d 1 (2010) is particularly misplaced. *Cornish* interpreted the intent of contracting parties based on remedies available under settled law at the time the contract was formed, holding it was proper for the trial court to order an equitable grace period because the contracting party possessed this right "from the outset" of the contract. *Id.* at 224. By contrast, Patricia did not possess the community property interest from the outset of the contract. Patricia's community property interest did not exist until Walter died in 2009, six years after the contract was formed. Unlike the contracting party in *Cornish,* Patricia did not

possess the rights she asserts at the time the contract was made; she acquired a community property interest in exchange for her mutual binding promises.

Patricia also did not possess the right to unilaterally give away community property at the time the contract was formed, making *Cornish,* 158 Wn. App. 203, doubly unhelpful to her. At the time Walter and Patricia made the contract, neither one of them had the right to unilaterally give away community property. Settled law prohibits a spouse from giving away community property without the consent of the other spouse. RCW 26.16.030(2); *Bryant v. Bryant*, 125 Wn.2d 113, 882 P.2d 169 (1994). Patricia infers that when the contracts were made in 2003 Walter had in mind community property law that would apply in the future, rather than community property law that applied at the time they made the contract. But there is no textual support for this inference. Moreover, it conflicts with the holding of *Cornish*, 158 Wn. App. 224, that courts look to the parties' rights under existing law at the time the contract is formed to discern intent.

Imposing an estate plan that would give Patricia's heirs almost twice as much as Walter's would be an affront to Walter's express intent. Because Walter maintained the separate nature of his property holdings during his marriage to Patricia, CP 216, 259, 300, his proportionate share

of the combined property was 73.5% and Patricia's share was 26.5%. CP 300. Allowing Patricia to give away half of the combined property before her death would turn this ratio on its head. Instead of receiving 26.5% of the total property, Patricia's heirs will receive 63.25%, and instead of receiving 73.5% of the total property, Walter's children will receive 36.75%. *See supra* at 8. This result cannot be squared with Walter's intent as gleaned from the language and purpose of the FPA and mutual wills.

3. Gifts by implication are not favored.

Allowing Patricia to give away half of the combined property is equivalent to an implied gift of 31.97% of Walter's separate property or more than $1.5 million. *See supra* at 8. Testamentary gifts by implication are disfavored. *Seattle-First Nat'l Bank v. Tingley*, 22 Wn. App. 258, 263, 589 P.2d 811 (1978). "The showing of intent must be so strong that a contrary intent cannot be supposed to have existed in the testator's mind." *Id.* Here, Walter maintained his separate property during his long marriage to Patricia. He did not state in the FPA or his Will that he wanted Patricia's children to receive any more than her proportionate share of their combined property. The inference that Walter intended to give Patricia's heirs 31.97% of his property is unsupported by the clear meaning of the documents and is impermissible.

4. Patricia's gifts violate the contractual duty of good faith.

"There is an implied duty of good faith and fair dealing in every contract[.]" *Frank Coluccio Constr. Co. v. King County*. 136 Wn. App. 751, 764, 150 P.3d 1147 (2007). Bad faith in the performance of contractual duties includes "evasion of the spirit of the bargain, lack of diligence and slacking off [and] willful rendering of imperfect performance[.]" *Francis v. Dep't of Corr.*, 178 Wn. App. 42, 57, 313 P.3d 457 (2013) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. d, quoted in part in BLACK'S LAW DICTIONARY 159 (9th ed. 2009)). Here, Patricia agreed that Walter's heirs would inherit 73.5% of the combined property when she died, unless it was needed for her care and support. Giving the property away before death to remove it from the irrevocable distribution formula is a subterfuge and evasion of the FPA and mutual wills, and violates Patricia's contractual duty of good faith.

5. If allowed, Patricia's gifts yield an absurd result.

Courts must avoid interpreting contracts in ways that lead to absurd results. *Forest Mktg. Enters., Inc. v. Dep' t of Natural Res.*, 125 Wn. App. 126, 132, 104 P. 3d 40 (2005). Under the estate plan sanctioned by the trial court, the surviving testator's heirs will receive 50% more than they would have received if the second to die had instead died first. *See supra* at 8. A 50% distribution variance depending on who dies first is not

a rational estate plan. It is tantamount to testamentary Russian roulette and contrary to the reason people execute mutual wills, which is to establish "fixed obligations" governing distribution after both testators have died. *Estate of Richardson*, 11 Wn. App. at 760; *Newell v. Ayers,* 23 Wn. App. at 769. A distribution plan that varies by 50% depending on who dies first defies any rational purpose.

C. The Attorney Fee Order Should Be Reversed.

Patricia argues because the trial court has not entered a judgment and not yet ruled on the fee amount, that the fee award should not be upset on appeal. However, as argued in the Opening Brief, *Kitsap Bank v. Denley*, 177 Wn. App. 559, 581-2, 312 P.3d 711 (2013) holds that "[a] trial court abuses its discretion if its decision to award or deny attorney fees under RCW 11.96A.150 is manifestly unreasonable or based on untenable grounds or reasons." Because the trial court has not articulated any grounds or reasons, the award, not the amount, should be vacated.

Finally, Patricia states correctly that RCW 11.96A.150 expressly authorizes the Court of Appeals to make an independent decision on the question of fees to any party. This statute thus serves as the basis to have Patricia's fees vacated and Appellants' fees approved.

V. CONCLUSION

The estate plan put in effect by the trial court's summary judgment is contrary to Walter Forsberg's intent and the law. Appellants therefore respectfully request that this Court reverse the trial court's summary judgment order, and remand for entry of summary judgment in favor of Appellants, including an award of costs and attorneys' fees as requested in Appellants' Opening Brief.

Respectfully submitted this 10th day of December, 2014.

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COURT OF APPEALS OF THE STATE
OF WASHINGTON DIVISION II

In re PATRICIA L. FORSBERG SPOUSAL TRUST u/w of WALTER A. FORSBERG, Deceased.	**No. 46251-6** CERTIFICATE OF SERVICE
PAULINE FORSBERG and LESLIE FORSBERG, Appellants, v. PATRICIA L. FORSBERG, *et al.* Respondents.	

I certify that on the 10th day of December, 2014, I caused a true and correct copy of the Reply Brief of Appellants to be served on the following in the manner indicated below:

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I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Seattle, Washington on December 10, 2014.

Christine James
Legal Assistant